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MAKING THE MOST OF PUBLIC MONEY

A PRACTICAL GUIDE TO IMPLEMENTING AND CONTRACTING UNDER THE REVISED
EU PUBLIC PROCUREMENT DIRECTIVES¹

¹ *Directive 2004/18/EC* of the European parliament and of the Council on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts, (O.J. L 134, 30.4.2004) and *Directive 2004/17/EC* of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (O.J. L 134 30.4.2004).

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MAKING THE MOST OF PUBLIC MONEY

A PRACTICAL GUIDE TO IMPLEMENTING AND CONTRACTING UNDER THE REVISED EU PUBLIC PROCUREMENT DIRECTIVES²

I. INTRODUCTION

The European Union has just adopted two directives revising European rules on how public money is spent (Public Procurement Directives) – A General Directive combines public supplies, works and services (2004/18/EC), and the Utilities Directive covers energy, water, transport and postal services (2004/17/EC).

This guide has been developed by a group of European level non-governmental organisations in co-operation with European trade unions who have jointly campaigned within the EU institutions and EU Governments to strengthen the scope for considering social, employment, and disability, ethical and environmental issues throughout the public contracting procedure.

Our joint struggle has yielded several significant developments in the revised rules relating to these considerations, and it is vital that these achievements are fully embraced by implementing authorities in the Member States, and by public authorities in their contracting procedures. The guide seeks to emphasise that lowest price is not necessarily Best Value.

This guide is aimed at:

- **National and regional Government's** across Europe both in **implementing** the two new EU directives - to encourage them to take a positive approach, maximising the scope to consider social, employment, disability/equality, environmental and ethical issues, as well as in their role as a public contractor,
- **Public authorities** – to assist them in developing their procurement strategies to fully embrace the promotion of these considerations in their contracting procedures.
- **Members of trade unions and NGO's** - who have an interest in influencing how public money is spent in the promotion of social, employment and environmental considerations.

Though the guide sets out the scope for considering social and employment and environmental issues in different chapters, they should be considered jointly in an overall approach to developing a culture of achieving sustainable development goals through public procurement.

² **Directive 2004/18/EC** of the European parliament and of the Council on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts, (O.J. L 134, 30.4.2004) and **Directive 2004/17/EC** of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (O.J. L 134 30.4.2004).

In the Annex to the document you will find the full text of the **Articles** and **Recitals** supporting the arguments we make in each section. Recitals provide the interpretative framework for the Directives. **There is much of importance in these Recitals. When the provisions in the Articles of the Directives appear vague and ambivalent, the Recitals should be invoked to provide clarification.** For example, where the Articles are not clear on use of reference to labour standards, the Recitals clarify that consideration of ILO Conventions and collective agreements is permitted.

Member states have **21 months** from the date of publication in the Official Journal to implement Directives into national legislation i.e. by January 31 2006.

a) What is public procurement?

Public procurement rules relate to the procedures for the award of public supply, public service, public works and utilities contracts all over the European Union and the European Economic Area. Public procurement accounts for over 16% of the European Union's GDP equivalent to 1500 billion Euros. Moreover, it has a determining effect on certain sectors such as construction and public works, energy, telecommunications and heavy industry.

In addition to their economic importance, such rules have a direct impact on the daily lives of European citizens. It is through public procurement that decisions are made on public transport, building our schools, hospitals, and roads, making our towns and cities better places to live in, cleaning our schools and hospitals, as well as running their canteens, our water supplies, waste treatment, equipment of public offices, schools, hospitals etc.

b) Public procurement as a tool to sustainable development

Decisions taken by public authorities or entities responsible for public purchases of products, services, and works have a substantial impact on the environment, on social and employment conditions, and human rights in the local community and globally, as well as on health, and social inclusion of disadvantaged or discriminated groups, such as people with disabilities.

Provisions in public procurement legislation and their use might either favour or limit sustainable development, as they will affect an important share of the market. The possibility, for instance, to include requirements on noise reduction, CO₂ emissions, respect for labour standards and working conditions, accessibility for people with reduced mobility, fair trade purchases, and employment of disadvantaged groups can contribute to greater sustainability and to changing practices both in the private and public sector. Public Procurement acts as a driver to industries to develop all their products or services according to the requirements of public authorities, rather than two lines of products or services, one environmentally sound or accessible and one not.

Public authorities have a major responsibility to ensure that all citizens can benefit from their investments, that they can live in healthy and environmentally sound community with a high level of social and employment protection and social inclusion. Moreover, neglecting these issues at the contracting stage of a project, often leads later to additional costs for public authorities.

A public authority's sustainable development strategy should not 'pick and choose' environmental over employment issues, but should develop an all encompassing culture, balancing all of these considerations in line with the draft EU Constitutional Treaty which sets the objectives that: *The Union shall work for sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy,*

aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment.

Public procurement is a key tool in delivering these goals and should be fully integrated into public authorities' sustainability strategies.

c) The new EU directives and their impact at national level

The revised Directives offer scope for contracting authorities to consider social, employment, ethical and environmental issues. The revision process has helped to clarify and strengthen the scope for considering such objectives. In the past, this scope was vague, and discouraged many public authorities from pursuing such objectives. For several of the brave, it led to a generation of court cases (many of them helpful to our concerns) to clarify the rules, which have also helped to shape the revised Directives.

We are now in the national level implementation phase of applying these revised Directives with a deadline of 31 January 2006, and it is crucial that National and Regional Governments with the responsibility for implementing these provisions into their legal frameworks maximize the scope to include these considerations, and that public authorities develop their contracting procedures to ensure their use in practice.

Several aspects of the EU Directives offer Member States or public authorities' choices in applying certain provisions, and decision-makers should be urged to "gold-plate" the scope for extending the scope for applying social, employment, ethical and environmental considerations.

II. MAKING SUSTAINABLE CHOICES ACROSS CONTRACTING STAGES

According to new rules, social, environmental, and ethical considerations can be included into the different stages of the public procurement procedure.

Specifications to be met when drawing up a call for tender:

- Public authorities must identify a number of characteristics, which the product, work or service will have to meet. Rules and an outline of these characteristics are specified in articles and annexes relating to *technical specifications* of a tender.
- The EU directives refer specifically to environmental characteristics, accessibility for disabled people and design for all requirements.
- Contracting authorities may (and we feel *should* be obliged to) state bodies from which tenderers can obtain information on obligations relating to employment protection and working conditions in force, and request them to indicate they have taken account of them.
- Conditions for the award of a contract must be specified. These may include criteria to meet social, employment and environmental requirements. (See Recital 46 (55)).
- Public Authorities may reserve contracts for performance in the context of sheltered employment workshops or programmes for disabled people, and this is to be clear in the contract notice.

Contract performance:

- Public authorities can impose *performance conditions* of the contract on the company that wins a call for tender; these may range from environmental requirements, application of laws, and collective agreements in the areas of employment conditions, and safety at work, observing workers' rights under the Posted workers Directive, recruiting long-term job seekers, implementing training measures for the young and unemployed, complying with ILO Conventions, to the employment of a certain percentage of disabled people to do the job. These conditions must be established in the call for tender.

Exclusion from Tender:

- There are provisions relating to the *exclusion* from public tenders for companies, which do not respect legislation or have been found guilty of fraud. Non-compliance with environmental or employment conditions and safety at work laws in force is seen as grave misconduct and can lead to exclusion.
- Before rejecting **abnormally low tenders**, authorities shall request in writing details relating to compliance with provisions relating to employment protections and working conditions. (art. 55 d)

Award of Contract:

- Social, employment, ethical, and environmental considerations can be taken into account in the final choice of a tender *the award criteria*, when an authority is deciding the most economically advantageous bid, now **from the point of view of the contracting authority**. Again these must be specified in the call for tender, and the Directive refers authorities to its base in European Court case law relating to the environmental and social area.

III. DETAILED ANALYSIS OF SCOPE TO IMPLEMENT ENVIRONMENTAL, SOCIAL, EMPLOYMENT AND ETHICAL CONSIDERATIONS

III.A Environmental considerations

There are several references to environmental considerations in the new directives, which are also considered as an overarching theme, in line with EC Treaties provisions.

Following requirements of Article 6 of The Treaty, Recital 5 provides that “contracting authorities may contribute to the **protection of the environment and the promotion of sustainable development**” and Recital 6 states that the Directive should **not prevent to protect animal and plant life**.

These principles are spelled out in the provisions covering different phases of the public procurement procedure.

III.A.1 Technical Specifications or requirements to be included in tenders

Content of provisions

Technical specifications are all technical requirements, which are listed in the documents drafted by public authorities, constituting the call for tender. Such specifications can specify characteristics of materials, products, supplies or services.

The use of environmental characteristics in technical specifications is identified in article 23, and annex VI of the directives. Recital 29 provides further explanation.

Technical specifications **may include environmental characteristics** and may use for that purpose **requirements that are laid down in eco-labels** (Article 23 and Recital 29). These eco-labels might be European, multi-national or national. They must have been adopted through a procedure involving all relevant stakeholders, including environmental organisations, and be based on scientific information.

Technical specifications are further defined in Annex VI and shall include **environmental performance levels, production processes and methods** (Annex VI)

Recommendations

Environmental characteristics should take account of the entire life cycle of a product. Often the most important environmental impact occurs in the production phase. Apart from allowing public authorities to consider this, the Directives allow also for the use of eco-labels as selection criteria.

National legislation should make differences between the different types of eco-labels. Full use should be made of the leeway given by the Directives in favour of Type I eco-labels. Type I eco-labels like European Flower, German Blue Angel, Nordic Swan a.o.m. have the advantage to provide quantitative criteria developed in multi-stakeholder processes and they put the producer under the obligation to either give detailed evidence on meeting the criteria or to have certified their products.

Self-claims (Type II eco-labels) should not be recognized. Environmental declarations (Type III) should only be used if they are fulfilling the stricter options envisaged in ISO 14025, i.e.

- complete LCA and
- program category rules (PCR) of a representative PCR program,
- both reviewed by a panel of interested parties.
- the environmental product declaration at the end should be certified by a third party.

III.A.2 Contract performance conditions

Content

These conditions may be imposed by public authorities and entities on companies which will have to respect them when they execute the contract. They must be indicated in the contract notice or in the specifications.

Article 26 states that authorities may lay down special conditions on performance of the contract and such conditions may concern **environmental considerations**.

These are further defined in Recital 33, which states that they may include conditions favouring **the protection of the environment**.

Recommendations

It is extremely important that public procurement subscribes generally to ecological principles. Many governments have clauses in their constitutions to claim for it and it should thus be reflected in the implementation of the Public Procurement Directives that public authorities should strive for sustainability. This should be indicated in the contract notices as e.g. in the following example.

Timber products from legal and sustainable sources

National legislation should favour, or insist on, timber products deriving from legal and sustainable sources.

Both EU and WTO allow authorities to rule companies out of tenders on grounds that could include breach of international and national laws on forest management, harvesting and timber trade. In spite of restrictions imposed by EU and WTO rules, therefore, governments do have substantial scope to insist on timber products from legal and sustainable sources. To assist EU members in this, the EU Commission should revise its current guidance on procurement as soon as possible to remove all remaining ambiguity. It should also include specific guidance in relation to the procurement of timber products. At the same time, however, the EU's member states should not wait for clarification; they and other countries should seize the opportunity offered by their purchasing power to combat trade in illegal timber and to promote responsible forest management.

Purchasing authorities would need to specify, in terms that could be evaluated objectively, what they meant by 'legal and sustainable' sources.

Interpretation Of 'Legal and Sustainable'

The Scottish Executive has established criteria for 'legal' or 'sustainable'³. The policy requires purchasing authorities to ensure that suppliers provide documented or certified evidence under a credible scheme that demonstrates:

- the operation of an environmental management system, incorporating forest management criteria that complies with internationally recognised principles;
- certification under a national or country specific scheme which is approved by one or more internationally recognised umbrella or accreditation schemes;
- that the timber has been acquired in accordance with national legislation in the country of origin and any applicable international agreements (CITES).

Where this requirement cannot be met, purchasers must obtain full assurance that the timber or timber product has come from a sustainably managed forest or a viable alternative.

³ The Scottish Executive's procurement policy can be found at <http://www.scotland.gov.uk/about/FCSD/PCSD-POL/00017839/procpolicy.aspx>

III.A.3 Selection or exclusion of candidates

Content

Companies submitting an offer for a tender may be excluded on the ground that they are not complying with legislation in force in the place where the contract will be enforced.

Contracting authorities may state in the contract documents, or be obliged to state by a Member State, **information on fulfilment of obligations relating to environment protection provisions** in force, in the State, region or locality where the works or services are carried out.

Companies submitting a tender should indicate that they have taken account in their proposal of these legal requirements (Article 27).

Candidates (tenderers) that have been the subject of a conviction by final judgement will be excluded from participation in public contracts. Conviction for breach of environmental legislation could mean exclusion from participation (Article 45).

When assessing in public works and public service contracts the company's technical abilities, an indication of the environmental measures that companies will be able to apply when performing a public contract will be considered (Article 48).

Contracting authorities **can require companies to meet environmental management standards** be it EMAS or the ISO standard through certificates delivered by independent bodies (Article 50 + Recital 44).

As an alternative to certification procedures, member States may draw an official list of companies meeting the requirements stated in Articles 45, 48 and 50 (Article 52).

Recommendations

National law should transpose the EU Directives requiring the tenderer to be in compliance with national, EU and international environmental legislation shall be a prerequisite before a purchasing authority decides awarding a contract to the tenderer. If the tenderer has been convicted on environmental crime, he shall be excluded from the process right away.

EMAS registered and ISO 14001 certified companies have an environmental management system in place and can be presumed to have control of their environmental aspects. They merit to be given credit for it. This should be laid down in national legislation. Also other, more specialized standards, like forest management standards shall be recognized as long as they fulfil the requirements of Article 50.

III. A.4 Contract Award

Content

Environmental characteristics may be included as criteria on which the award of the contract is based when the choice is made on the basis of the tender 'most economically advantageous from the point of view of the contracting authority'.

Alternatively the contracting authority may choose a tender according to the lowest price offer.

The contracting authority will specify in the contract notice the order of importance of each of the criteria as well as the weighting criteria.

These criteria must be linked to the subject matter of the contract.

The Article must be read together with Recital 1 which states that the directives are based on case-law of the European Court of Justice on award criteria. In particular the European Court of Justice stated in the 'Helsinki Bus case' that the notion of "Most economically advantageous from the point of view of the contracting authority" can be related to the general interest of the Community interest. The Court ruling on the Helsinki Bus case⁴ allows the award of the contract to be granted not only considering money terms but also taking account of value terms. In that case public authorities gave additional points to a company that offered buses emitting less noise and nitrogen oxides.

It is also important to note that if environmental criteria have been mentioned in the specifications of the contract, they can also be used as award criteria (Recital 46).

Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne

In its judgment of 17 September 2002 the ECJ ruled that *"where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination."*

Furthermore:

[the Directive] cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority. That conclusion is also supported by the wording of the provision, which expressly refers to the criterion of the aesthetic characteristics of a tender."

⁴ Judgment of the Court of Justice in Case C-513/99; Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne

Recommendations:

A contracting authority may include award criteria that are not of a purely economic nature, but they must be linked to the subject matter of the contract. This has to be made quite clear in national law.

III. B Social, Employment and Ethical Considerations

Social, employment and ethical considerations can be included in several phases of the contracting process. These vary from providing information and ensuring compliance relating to employment protection, working conditions, respect for ILO Conventions, support for long-term job seekers, and for the disadvantaged. Some of the provisions refer specifically to people with disabilities Overall, the revised Directives remove much of the past uncertainty in consideration of these issues, and we expect public authorities to embrace this clarity, and use the scope for considering these issues more extensively.

Recommendations

It is important nonetheless that framework provisions on social and employment aspects of the directive are broadened and made more explicit in national legislation.

In several cases, Governments must decide how to implement certain requirements into national and regional rules. National and regional Government's should make these requirements compulsory while developing clear guidelines for their implementation and monitoring.

The same recommendation applies to the need for introducing certification and quality labels to back up some of the requirements (for instance the possibility to meet contract performance conditions, or technical specifications for example relating to competence to ensure safe removal of asbestos) or to prove compliance with social legislation (employment conditions or employment quotas).

III.B.1 Supported employment workplaces

Content

Article 19 allows public authorities **to reserve tenders for supported employment workplaces.** (*Article 19, recital 28, and Annex VII a*).

This is a new Article and is a significant social issue. It gives contracting authorities the scope to positively support employment opportunities for disabled people, and will bring extensive benefits for disabled people, bring much needed, good quality work into supported employment factories and workplaces and programmes. As well as producing a large range of high specification manufactured goods such programmes are actively providing high quality services such as CCTV operators, information technology services, back office services, canteen and cleaning contracting, and public authorities and Governments should not underestimate the diversity of supplies, services and works that could be provided through reserved contract arrangements.

The Article recognises that a level playing field has to be created for sheltered workshops and/or sheltered employment programmes where most of the employees are disabled and cannot compete with commercial enterprises under normal conditions.

Recital 28 also specifies that **public authorities may request companies winning a bid to perform their contract in the context of a sheltered employment contract.**

If a public authority decides to reserve a tender to sheltered workshops on sheltered employment programmes, it must specify this in the contract notices. The provision applies for tenders from supported employment companies across the EU on an equal treatment basis.

Recommendations

It is important to ensure that the legislative framework adopted at national level obliges and encourages public authorities to make use of this opportunity.

Public Authorities should work with providers to explore the wide range of high quality/high specification supplies, works and services that could be provided through this arrangement.

We suggest including in national legislation, provisions obliging contracting authorities, who reach a certain number of contracts per year, to reserve a percentage of their public tenders or through establishing a threshold in terms of overall budget devoting to tendering to companies employing a majority of disabled persons. A system combining the two (percentage of overall number of contracts, and amount thresholds) would be also appropriate.

III.B.2 Technical Specifications or requirements to be included in tenders

Content

Accessibility or design for all criteria for disabled persons can be included in the definition of technical specifications (requirements) of a contract bid, as established in article 23 and in Annex VI.

According to the article, accessibility criteria should be taken into account whenever possible.

Design for all requirements and accessibility for disabled persons are also mentioned in Annex VI, which defines further the use of technical specifications.

Technical specifications may be also used as award criteria (when making the final choice of a tenderer) as outlined in recital 46.

Further explanation on the inclusion of accessibility or design for all criteria in technical specifications is included in Recital 29, where it is stated that these provisions should be clearly indicated.

Technical specifications and labour standards – though less clear, the case for inclusion of labour standards in the consideration of technical specifications is compelling, and should be given its fullest scope. Annex VI refers to *characteristics...and conformity assessment*,

performance, safety or dimensions including procedures concerning quality assurance...production processes and methods. We would argue that the quality of the product and production method and process is affected by the labour standards applied during its production or provision (if a service), and we wish public authorities to establish this link, bringing in the Recital 33 reference to compliance with basic ILO standards. Would public authorities try to justify, for example, that the use of child labour in a production process for a product they had bought was an acceptable method of production? We think not, and therefore would like to see this consideration given the broadest consideration possible.

Conformity requirements relating to health and safety are also important considerations of technical specifications, for example in the safe removal of asbestos, gas fitting and maintenance, construction site safety including scaffolding etc. and should be a central consideration.

Recommendations

It is important that the reference to 'whenever possible' is interpreted in broad terms.

Accessibility requirements should be defined as a general rule, and exceptions should be restricted to precise cases. National legislation should include clear guidelines on when public authorities should and may not take into account accessibility criteria.

Consideration should be given to the inclusion of compliance with labour standards in the assessment of production processes and methods, as well as safety and quality assurance issues.

Health and safety related conformity assessment should be a priority consideration in technical specifications.

It is also critical that national legislation includes a definition of accessibility criteria for people with disabilities and design for all. Whenever a legislation at national or regional level imposes obligations on accessibility (for the built environment, products, services, etc..) across reference should be included in public procurement law.

III.B.3 Conditions for the performance of a contract

Content

Public authorities may lay down special conditions on performance of the contract and such conditions may concern social considerations (Article 26).

Contract performance conditions are specified in Recital 33, which also includes a non-exhaustive list of social considerations. They may be intended to promote:

- on-site vocational training
- the employment of people experiencing particular difficulty in achieving integration in the labour market
- the fight against unemployment.

It is also possible to include requirements, which would be applicable during the performance of the contract:

- to recruit long-term job-seekers
- to implement training measures for the unemployed or young persons
- to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law (Note this would imply that compliance with the Conventions would be required regardless of whether they have been implemented in national law)
- to recruit more disabled persons than are required under national legislation (in the countries where quota systems exist).

Recital 34 also specifies that national legislation on employment, social security, health and safety as well as collective agreements must be applied in the performance of a contract. In cross border situations, the EU directive on posting of workers will apply. As tenders are EU wide, both domestic and non-domestic contractors must comply with these requirements. The fullest information relating to the details of the obligations to meet employment rights, working conditions and labour standards in force, by law or collective agreement, should be provided by contracting authorities.

The recital also clearly indicates that non-compliance with these provisions will lead to the exclusion of the bidding company.

Recommendations

It is crucial that this possibility is codified in national (or regional) legislation. In addition, the legislation should include a non-exhaustive list of social considerations (which can go beyond the list included in the EU directives), as well as guidelines on the use of social considerations and labour standards by contracting authorities.

III.B.4 Employment rights, conditions and protections

Content

The new directives reinforce criteria for ensuring compliance with social legislation, and exclusion of companies in breach.

Contracting authorities may state in the contract documents, or be obliged to by a member state, the bodies for obtaining **information on obligations relating to employment protection and working conditions** in force in the place where the contract will be carried out. These obligations could be provisions covered by law or collective agreement, and this should be made clear. We would expect Member states and regional Governments implementing the legislation to **oblige** public authorities to state the bodies, but emphasise that contracting authorities can state the bodies for obtaining information regardless of whether prescribed in the implementing legislation, and in our view should do so.

Bidding companies have to indicate that they have taken account of these obligations (Article 27). This is not merely an information exercise, as these are conditions which “shall be applicable” to the works or services provided during the performance of the contract.

Suitability of Participants - Various articles in the Directives set out verification of suitability of participants relating to criminal records, bankruptcy etc., and scope for exclusion, (Articles 44-48).

Abnormally low (price) tenders - contracting authorities shall request further information on employment protection and working conditions in force at the place where the work, service or supply is performed (Article 55), before rejecting a tender on these grounds.

Finally Recital 43 indicates that **companies found guilty by a public instance of breaching national provisions implementing EU legislation on non discrimination and equal treatment of workers**, should be excluded from tenders.

Recommendations

National public procurement provisions should include the **obligation** for public authorities to state the body or bodies where information on employment protection and working conditions can be obtained, whilst recognising that public authorities can (and should) state this regardless of national provisions.

Contracting authorities should ensure tenderers indicate in their tendering documents how they have taken into account key obligations (under law **and** collective agreements) in the area of employment protections, working conditions and health and safety. This should also include account of compliance with legislation on equal treatment and non-discrimination in access to employment.

Contracting authorities should require a detailed declaration indicating awareness of the relevant employment protections, labour standards, and working conditions, as well as how they will apply them in the contract.

III.B.5 Awarding Contracts

Content

The wording of the conditions for awarding contracts is now more subjective, in that it now states “most economically advantageous **from the point of view of the** contracting authority. (Article 53 (55)), as a choice, opposed to lowest price offer.

This opens up the scope for taking a wider view of Best Value, where consideration of sustainable development goals over the life of the product, or service may be considerably more economically advantageous than the lowest price offer. Awarding contracts to the lowest bidder, increases competitive pressure to present tight bids where tenderers squeeze staff levels below the level needed to provide a quality product, service or work; lower working conditions, training, and employment protections, which de-motivates workers and lowers the quality and productivity of their work, and encourages a high turn over of workers and difficulties in recruiting new workers. In the worst cases lowest price pressures can lead to illegal and unprofessional practices⁵.

⁵ In the cleaning sector, the European Employers, EFCl, and trade unions, UNI Europa have produced a guide and joint social partner declaration on “Selecting Best Value for the public procurement of cleaning services”⁵ seeking to encourage public authorities to look beyond lowest price to avoid driving companies with high social and environmental standards out of the market place to be replaced by a corral of cowboys, incapable of providing the quality and sustainable goods, services and works that tax payers deserve. See website www.union-network.org

Though social considerations are not specifically included as award criteria in the Article itself, nevertheless, the list of criteria to consider most economically advantageous tenders in this Article is non-exhaustive. The political struggle that led to this compromise wording based much on the clarification of the Article based in Recital 1, and contracting authorities should apply this crucial clarification to its interpretation of the Article. Specifically, the Recital states that the Directives are based on Court of Justice case-law “*which clarifies the possibilities for contracting authorities to meet the needs of the **public concerned, including in the environmental and/or social area, provided they are linked to the subject of the contract***”

Specifically, the case-law would include the Nord-pas-Calais case on long-term unemployed and the *Helsinki Bus* case on community interest in reducing pollution).

In the judgement of the Nord Pas de Calais case⁶, the Court stated that the use of an award criteria relating to the fight against unemployment is legitimate as long as it is expressly mentioned in the tender documents.

In our view, this revised wording and inclusion of Recital 1 allows contracting authorities to argue that, from **its subjective point of view**, social and employment considerations are economically advantageous, and meet the needs of the public concerned.

Furthermore, Recital 46 states that contracting authorities may use criteria aimed at meeting social requirements in response to the needs of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services, which are the object of the contract belong.

The wording in the article is ambiguous and unclear. What should be retained is the possibility for contracting authorities to use social considerations.

Recommendations

National or regional implementing legislation should maximise and encourage the scope for contracting authorities to apply social and employment criteria as far as the revised rules allow.

Belgium has already included in their procurement legislation social and ethical criteria in the corresponding article on the award criteria. Also such provisions exist in a number of regional Governments’ legislation. It is important that such examples are followed.

Contracting authorities could provide a list of examples of social considerations they consider to be linked to the subject matter of the contract, and which they deem to be economically advantageous.

⁶ Commission v. France, case C-225/98.

Relevant articles⁷

A. Technical Specifications or requirements to be included in tenders

➤ Recital 29 (Recital 42)

[...]

Contracting authorities that wish to define **environmental requirements** for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use appropriate specifications that are defined in **eco-labels**, such as the European Eco-label, (multi-)national eco-labels or any other eco-label providing the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and providing the label is accessible and available to all interested parties.

Contracting authorities should, whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. **The technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover.**"

➤ Article 23 (Article 34)

Technical specifications

1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. **Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.**

[...]

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated: (a) either by reference to technical specifications defined in Annex VI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when these

⁷ The numbering and text of the Articles refers to directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Numbering of the directive relating to energy, water, and transport are referred to in brackets.

do not exist - to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words "or equivalent";
(b) or in terms of performance or functional requirements; **the latter may include environmental characteristics.**

[...]

6. Where contracting authorities lay down **environmental characteristics** in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) **national eco-labels, or by and any other eco-label**, provided that:

- those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,
- the requirements for the label are drawn up on the basis of scientific information,
- **the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate**, and
- they are accessible to all interested parties.

[...]

➤ ANNEX VI (Annex XXI)

DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of this Directive:

(a) "technical specification", in the case of public works contracts, means the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These characteristics **shall include levels of environmental performance, design for all requirements (including accessibility for disabled persons)** and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling and production processes and methods. They shall also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

(b) "technical specification", in the case of public supply or service contracts, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, **environmental performance levels, design for all requirements (including accessibility for disabled persons)** and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures;

B. Conditions for the performance of a contract

➤ Recital 33 (Recital 44)

Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or **the protection of the environment**. For instance, **mention may be made**, amongst other things, **of the requirements - applicable during performance of the contract - to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions**, assuming that such provisions have not been implemented in national law, **and to recruit more handicapped persons than are required under national legislation**.

➤ Recital 44 (Recital 53)

In appropriate cases, in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a public contract, the application of such measures or schemes may be required. Environmental management schemes, whether or not they are registered under Community instruments such as Regulation (EC) No 761/2001(17) (EMAS), can demonstrate that the economic operator has the technical capability to perform the contract. Moreover, a description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence.

➤ Article 26 (Article 38)

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract **may, in particular, concern social and environmental considerations**.

C. Employment and Environmental Rights, conditions and protections

➤ Recital 34 (Recital 45)

The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (11) lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

➤ Recital 43 (Recital 54)

[...]

Non-observance of national provisions implementing the Council Directives 2000/78/EC and 76/207/EEC concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

➤ Article 27 (Article 39)

Obligations relating to taxes, environmental protection, employment protection provisions and working conditions

1. A contracting authority may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to ... employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

2. A contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided.

The first subparagraph shall be without prejudice to the application of the provisions of Article 55 concerning the examination of abnormally low tenders.

➤ Article 45

Personal situation of the candidate or tenderer

1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

[...]

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and

[...]

may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities.

[...]

2. Any economic operator may be excluded from participation in a contract where that economic operator:

[...]

(c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;

3. Contracting authorities shall accept the following as sufficient evidence [...]:

(a) as regards paragraphs 1 and 2(a), (b) and (c), the production of an extract from the "judicial record" or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met;

(b) as regards paragraph 2(e) and (f), a certificate issued by the competent authority in the Member State concerned.

(c) they may be replaced by a declaration on oath or, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.

4. Member States shall designate the authorities and bodies competent to issue the documents, certificates or declarations referred to in paragraph 3 and shall inform the Commission thereof. Such notification shall be without prejudice to data protection law.

➤ Article 48

Technical and/or professional ability

1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

[...]

(f) for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract

➤ **Article 50 (Article 53)**

Environmental management standards

Should contracting authorities, in the cases referred to in Article 48(2)(f), require the production of **certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards** based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators.

➤ **Article 52**

Official lists of approved economic operators and certification by bodies established under public or private law

1. Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law

[...]

➤ **Article 55 (Article 57)**

Abnormally low tenders

1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

[...]

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

D. Criteria for awarding Contracts

➤ Recital 1 (Recital 1)

[...] This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, **including in the environmental and/or social area**, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2.

➤ Recital 5 (Recital 12)

Under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.

➤ Recital 46 (Recital 55)

Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition..... **a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs - defined in the specifications of the contract - of particularly disadvantaged groups of people** to which those receiving/using the works, supplies or services which are the object of the contract belong.

[...]

Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, **as defined in the technical specifications** and the value for money of each tender to be measured.

In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, **economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract.**

Article 53 (Article 55)

Contract award criteria

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or

[...]

(b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance

E. Supported employment workplaces

➤ Recital 28 (Recital 39)

Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for public contracts to such workshops **or reserve performance of contracts to the context of sheltered employment programmes**

➤ Article 19 (Article 28)

Reserved contracts

Member States may reserve the right to participate in public contract award procedures **to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons** who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions. The contract notice shall make reference to this provision.

➤ ANNEX VII A (Annex XVIII)

INFORMATION WHICH MUST BE INCLUDED IN PUBLIC CONTRACT NOTICES

Open and restricted procedures, competitive dialogues, procedures, negotiated procedures:

[...]

2. Where appropriate, **indicate whether the public contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes.**

ANNEX II

List of contacts



THE NETWORK
OF MAJOR
EUROPEAN
CITIES

EUROCITIES is the network of European large cities, representing 120 cities from across Europe that are home to more than 100 million inhabitants. EUROCITIES works towards a common vision of a sustainable future in which all citizens can enjoy a good quality of life. Tel: +32 2 552 08 88; Fax: +32 2 552 08 89; email info@eurocities.be
www.eurocities.org



European Confederation of Workers' Co-operatives, Social Co-operatives and Participative Enterprises (CECOP) is an international non profit association representing small and medium-sized worker-controlled enterprises across 42 member countries of the Council of Europe. tel : +32 2.543.10.33; fax +32.2.543.10.37 email cecop@cecop.coop
www.cecop.coop



European Disability Forum (EDF) is the European umbrella organisation representing the interests of 50 million disabled citizens in Europe. The EDF's mission is to ensure disabled people full access to fundamental and human rights. Tel. +32 2 2824600; Fax +32 2 2824609; email info@edf-feph.org
www.edf-feph.org



European Environmental Bureau (EEB) is a federation of 143 non-governmental organisations in 31 countries. The EEB's mission is to promote environmental policies and sustainable policies on the European Union level Tel : +32 2 289 1090 Fax : +32 2 289 1099; email info@eeb.org
www.eeb.org



European Federation of Public Service Unions (EPSU), represents 180 public sector unions organising 8 million workers across Europe in national and European administrations, local and regional government, health and social services and public utilities (energy, waste, water). Tel: + 322 250 10 80; Fax: + 322 250 10 99; email epsu@epsu.org
www.epsu.org



ETUC is a social partner speaking for workers and their organisations at EU level. It works for the development of a united Europe of peace and stability where workers can enjoy high living standards. The ETUC's membership numbers 77 national trade union confederations in 35 countries, and 11 European Industry Federations representing 60 million workers. Tel: 32-2-2240-411; Fax: 32-2-2240-454/55; email ETUC@ETUC.ORG
www.etuc.org



GMB is Britain's 4th largest trade union representing 650,000 members over 8 sectors: public services, commercial services, construction, engineering, food and Leisure, process, energy, textile and clothing. Tel: +322 230 56 75; Fax: +322 230.56.24 ; email gmb-brussels@geo2.poptel.org.uk
www.gmb.org



The Social Platform is an association of over 30 European non-governmental organisations, federations and networks that work in the social sector. The Social Platform's main objective is to build a Europe for all by advocating social inclusion and social justice, and fighting against all forms of discrimination. Tel.: 32 2 511 37 14, Fax: 32 2 511 19 09, email: policy@socialplatform.org, www.socialplatform.org

ANNEX III

Examples of good practice

Please send us examples of good practice for including environmental, social, and ethical considerations into public contracting rules!